IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 9, 2003 Session

SANDRA ELAINE HELTON (BUSCHER) v. SHAUN EDWARD HELTON

Appeal from the Circuit Court for Davidson County
No. 96D-1125 Muriel Robinson, Judge

No. M2002-02792-COA-R3-CV - Filed January 13, 2004

As part of their 1997 divorce, a husband and wife executed a marital dissolution agreement (MDA) which gave the wife primary physical custody of their child. One section of the agreement contained the wife's promise to continue to live in Davidson County or adjoining counties and not to move from that area without the husband's permission. The wife remarried. When her new husband transferred to a job in Jackson, Mississippi, the former husband filed a petition to prevent the wife from relocating. After a hearing, the trial court declared that it would enforce the MDA. We reverse and remand this case for a new hearing because Tenn. Code Ann. § 36-6-108 controls relocation determinations.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

David W. Garrett, Nashville, Tennessee, for the appellant, Sandra Elaine Helton (Buscher).

Phillip Robinson; Teresa Webb Oglesby, Nashville, Tennessee, for the appellee, Shaun Edward Helton.

OPINION

I. THE MARITAL DISSOLUTION AGREEMENT

This case presents the question whether a marital dissolution agreement (MDA) that imposes stringent limitations on the custodial parent's right to relocate, *i.e.*, by giving the noncustodial parent approval authority, can be enforced in contravention of a statute containing specific standards to be applied by the court and recognizing the court's authority to make relocation decisions. We begin by discussing the agreement at issue.

On May 29, 1997, the Fourth Circuit Court of Davidson County granted a divorce to Sandra Elaine Helton on the ground of irreconcilable differences. The Final Decree incorporated a Marital Dissolution Agreement signed by both parties. Its terms included joint custody of Samuel Luke Helton, the parties' four year old son, with the wife to have primary physical custody, and the husband to enjoy overnight visitation every weekend, with additional visitation during the week, and five weeks of uninterrupted visitation during the summer. The husband also agreed to pay child support of $650 per month, a downward deviation from the guidelines which was justified by his extended visitation. The relocation clause of the MDA (entitled "Jurisdiction") reads as follows:

> Wife has solemnly promised that she will continue to live in Davidson County or adjoining counties and will not move and take the child with her under any circumstances. Husband has based his decision to sign this Agreement and forego a hearing on the merits as to custody on that promise. Wife hereby again promises not to move the child from Davidson or adjoining counties without Husband's written permission. Wife hereby acknowledges that it is in the manifest best interest of Luke that he remain and be raised in Metro-Davidson County or contiguous counties near his father. Should wife decide to move from these counties, she agrees to proceed in the following order:
>
> A. Notify Husband and fully inform him of all the details.
>
> B. Pay any attorney fees or other costs incurred by Husband as a result of her decision.
>
> C. Should she move with the child from Davidson or adjoining counties, Wife agrees to pay all expenses necessary for husband to maintain the same visitation with child as agreed in Section 2.
>
> The parties agree that the Fourth Circuit Court of Davidson County will retain jurisdiction.

The record shows that both Ms. Helton's attorney and the trial court advised her against agreeing to the extended visitation and to the relocation clause, because of the likelihood of later complications.

She subsequently married Michael Buscher, who was working the afternoon shift (noon to 10:00 p.m) at the Nissan automobile plant in Smyrna, Tennessee. We will henceforth refer to the wife as Ms. Buscher. After the marriage, Michael Buscher's supervisors offered him the opportunity to transfer to a new Nissan plant in Jackson, Mississippi. He initially turned down the offer, but swayed by the prospect of future advancement and working on the day shift, he moved to Mississippi.

II. RELOCATION PROCEEDINGS

On November 28, 2001, Mr. Helton received a certified letter from Ms. Buscher stating her intention to join her new husband in Mississippi, and to relocate with Luke. Mr. Helton responded on December 7, 2001, by filing a Petition to Prevent Relocation. He cited the MDA, and asserted that it was not in the best interest of the child for the mother to relocate, in light of the ties between his son and himself and the presence in Davidson County of the child's paternal grandparents, aunts, uncles and cousins.

Mr. Helton's petition closely tracked the language of the Parental Relocation Statute, Tenn. Code Ann. § 36-6-108, by stating that there was no reasonable purpose for the relocation, that it posed a threat of harm to the child, and that Ms. Buscher's motive was vindictive, in that she intended to defeat or deter Mr. Helton's visitation rights. We note that the use of the certified letter, and the filing of the petition are also procedures mandated by the Relocation Statute.

Ms. Buscher filed an answer to the petition on January 23, 2002. She denied all of Mr. Helton's allegations, and promised that if she were permitted to relocate, Mr. Helton would be able to enjoy the same amount of visitation as before. She also claimed that she had been intimidated into agreeing to the relocation clause in the MDA. The trial court referred the parties to mediation. Although both parties participated in the mediation, they were unable to resolve their differences. They subsequently entered into an agreed order, by which Ms. Buscher bound herself not to relocate with the child before the final hearing on Mr. Helton's petition.

The hearing took place on October 2, 2002. The testimony of the parties showed that both of them had experienced adjustment difficulties after their divorce, the details of which we need not discuss here. More importantly, they had for the most part managed to cooperate fairly well on matters involving their child. Luke was on the honor roll at school and enjoyed warm relations with both parents as well as with Mr. Helton's relatives. Ms. Buscher testified that if she were permitted to relocate, she would be able to spend more uninterrupted time with Luke and her new husband, thereby building a stronger family unit, but that she would not relocate if the judge did not approve.

At the conclusion of the hearing, the trial judge announced her decision from the bench. The judge noted that at the time the MDA was first presented to the court, she advised the mother not to sign it, predicting that it could lead to problems down the line. Nonetheless, she reasoned that Mr. Helton had relied on its provisions, and that it would be unfair to him not to enforce it. She also declared that if the mother chose to join her husband in Mississippi, the father would be named as the primary custodial parent. Attorney fees of $3,500 and court costs were awarded to the father.

The trial court's final order denied the mother's petition to relocate, finding there was no reasonable purpose for the relocation "under the Marital Dissolution Agreement," based upon findings that the remarriage and subsequent need to relocate were foreseeable at the time of the MDA, that the father was exercising more than standard visitation, that the child was doing well and

had close ties with his father and family, and that both parties had been wonderful parents. The court also found the relocation was not in the child's best interest.

Additionally, at the hearing the judge suggested to the mother that she appeal the decision to this court, noting that the MDA at issue was "a rare bird," and that in twenty years on the bench, she had never seen another like it. Ms. Buscher subsequently filed a Motion to Alter or Amend, which was denied. This appeal followed.

III. THE APPLICABILITY OF TENN. CODE ANN. § 36-6-108

Prior to the enactment of Tenn. Code Ann. § 36-6-108, the question of whether a parent who had been awarded custody as part of a divorce decree should be allowed to move with a child to another city, state, or country was determined by the unique circumstances presented by each case and by the application of an evolving body of case law. The courts had the difficult task of balancing the traditional right of the custodial parent to make decisions regarding his or her own life, as well as the child's upbringing and residence, with the right of the non-custodial parent to maintain a meaningful relationship with the child through appropriate visitation, while upholding the courts' primary obligation to ensure that the decision would be in the best interests of the child. *See Aaby v. Strange*, 924 S.W.2d 623, 625-29 (Tenn. 1996) (recounting the history of the developing and shifting case law on relocation); *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993).

In *Aaby v. Strange*, our Supreme Court recognized that this area of the law was unsettled and set out to resolve the confusion that had arisen about the proper standards to apply to relocation situations. The ultimate holding of *Aaby* was that the custodial parent would be allowed to remove the child unless the non-custodial parent could show, by a preponderance of the evidence, that the custodial parent's motive for moving was vindictive, *i.e.*, intended to defeat or deter the visitation rights of the non-custodial parent. *Id*. at 629. The exception to this rule was where relocation posed a specific, serious threat of harm to the child. *Id*. The Court, however, made it clear that the move itself, even though possibly distressing to the child, was not a sufficient basis for denying removal. *Id*. at 630. Thus, *Aaby* limited the circumstances under which a non-custodial parent could prevent a custodial parent from relocating with the child.

In 1998, our legislature enacted the provisions now codified at Tenn. Code Ann. § 36-6-108 to provide consistency in relocation proceedings. While the statute supercedes prior case law, it embodies much of the reasoning and the balancing of interests found in *Aaby*, including some views set forth in the dissent. Under the statute, the appropriate standard to be applied depends upon whether the parents actually spend substantially equal amounts of time with the child. *Wilson v. Wilson*, 58 S.W.3d 718, 727 (Tenn. Ct. App. 2001). If they do, no presumption in favor of or against relocation with the child arises, and the court decides the petition to relocate on the basis of the child's best interests. Tenn. Code Ann. § 36-6-108(c). If, however, the parent who spends the greater amount of time with the child seeks to relocate with the child, then relocation shall be permitted in the absence of a finding that the relocation does not have a reasonable purpose, poses a threat of harm to the child, or is motivated by an intent to defeat or deter visitation. Tenn. Code

Ann. § 36-6-108(d). If one of those circumstances is shown, the court is to then proceed to a best interest analysis. Tenn. Code Ann. § 36-6-108(e).

In the case before us, the mother promised in the 1997 MDA not to move the child from Davidson or adjoining counties without the father's permission and then only under enumerated conditions, such as payment of expenses of transportation for visitation. Thus, the agreement purports to give the father the ability to prevent the mother from moving with the child by simply withholding his permission. We note, however, that the MDA provision on relocation specifically recognizes the jurisdiction of the court that granted the divorce and approved the MDA. The 1998 statute, obviously, gives the court the authority to approve or disapprove a relocation, and that authority existed prior to the statute.

Ms. Buscher notified Mr. Helton of her intent to relocate with their child in 2001, and the proceedings resulting from that notice occurred in 2001 and 2002, well after the effective date of Tenn. Code Ann. § 36-6-108. Consequently, the statute would ordinarily be applied to the relocation question. However, Mr. Helton questions the applicability of the statute to vary an MDA executed prior to the statute's effective date.

This court has held that, because Tenn. Code Ann. § 36-6-108 is remedial in nature, it may be applied retrospectively without violating Article I, Section 20 of the Tennessee Constitution, which prohibits retrospective laws impairing vested rights acquired under existing laws. *Caudill v. Foley*, 21 S.W.3d 203, 208-09 (Tenn. Ct. App. 2000).[1]

In *Caudill*, the parties had entered into an MDA in 1996 that was incorporated into their divorce decree that included a provision that the mother, who had primary physical custody, would not remove the child from the state without first obtaining court approval. Consequently, this court found that application of Tenn. Code Ann. § 36-6-108 was not inconsistent with and did not undermine the MDA provision. The *Caudill* court decided that there was no vested right to have pre-statute law, *i.e.* the *Aaby* holding, applied to the parties' post-statute relocation dispute, that the parties had simply agreed that the custodial parent would get court approval to relocate with the child, and that the statute provided the procedure to be used in seeking such approval.

In the case before us, the MDA contained a more specific and more restrictive provision on relocation. The father asserts that the statute cannot be applied retroactively to deprive him of vested contract rights or to "impair the obligations of contracts" under Article I, Section 20 of the Tennessee Constitution. This argument, however, rests upon a mistaken understanding of the effect of the merger of the MDA into the judgment of the court and the court's overarching authority over custody matters.

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[1] Even before the *Caudill* decision, this court had previously decided that Tenn. Code Ann. § 36-6-108 was remedial in nature and its retrospective application did not impair any vested rights. *Adams v. Adams*, No. 01A01-9711-CV-00626, 1998 WL 721091, at *3 (Tenn. Ct. App. Oct. 16, 1998) (no Tenn. R. App. P. 11 application filed). *Adams* involved a pre-statute divorce decree, not an agreement by the parties, which prevented removal of the children from Davidson County.

Where as part of a divorce a husband and wife contract upon issues considered part of a legal duty or that remain within the jurisdiction of the court, the agreement of the parties becomes merged into the decree and loses its contractual nature. *Penland v. Penland*, 521 S.W.2d 222, 224 (Tenn. 1975). "[T]he reason for stripping the agreement of the parties of its contractual nature is the continuing statutory power of the Court to modify its terms when changed circumstances justify." *Id*.

A provision in a divorce decree for the care, custody and control of minor children "shall remain within the control of the court and be subject to such changes or modifications as the exigencies of the case may require." Tenn. Code Ann. § 36-6-101(a). Our courts have accordingly held that when a marital dissolution agreement with regard to custody is incorporated into a final decree, it is considered to have merged into that decree. *Vaccarella v. Vaccarella,* 49 S.W.3d 307, 314 (Tenn. Ct. App. 2001). Such agreements thereby lose their contractual nature and remain subject to the court's continuing jurisdiction, so that they may be modified as circumstances change. *Hill v. Robbins,* 859 S.W.2d 355, 358 (Tenn. Ct. App. 1993). The parties cannot bargain away the court's continuing jurisdiction over the care of the child and cannot irrevocably agree to the best interests of the child without regard to future developments or changes of circumstances.

Included in agreements on the care, custody and control of children are those that attempt to restrict the custodial parent's ability to relocate with the children. *Hill*, 859 S.W.2d at 358; *Smith v. Kelley*, No. 01A01-9711-CH-00657, 1998 WL 743731, at *6 (Tenn. Ct. App. Oct. 27, 1998) (no Tenn. R. App. P. 11 application filed) ("Provisions which restrict where the child shall reside are provisions which concern the care, custody and control of the child.") In both *Hill* and *Smith,* the parties had entered into MDA provisions that prohibited the custodial parent from relocating with the child.[2] The relocation proceedings in both cases predated the enactment of Tenn. Code Ann. § 36-6-108, so the application of the statute was not at issue. In both cases, this court determined that, regardless of the MDA provision, a proposed relocation was subject to the court's continuing jurisdiction over custody matters and would be determined by the court using applicable legal principles. *Hill*, 859 S.W.2d at 356; *Smith*, 1998 WL 743731, at *7.

Thus, at the time the parties herein entered into their MDA, it was clear that prior restrictions on relocation, whether appearing in an MDA incorporated into the decree or imposed by the court, were subject to modification, and courts remained at liberty to lift such prohibitions. Even if the statute were not applied herein to resolve the issue of the mother's location and the father's objections, Mr. Helton still would not be entitled to rely on the MDA provision to prevent the move. Instead, under pre-statute law as set out in *Aaby*, the mother would be allowed to relocate unless the father could show that her motive for moving was to defeat or deter his visitation rights. Thus, like the court in *Caudill*, we find that there is no constitutional impediment to applying the statute, which clarifies the procedures applicable to relocation decisions, to the case before us. The relocation provision in the MDA herein was not effective so as to deprive the court of its jurisdiction to allow

[2] *Smith* involved an MDA provision in which the parties agreed not to move more than sixty miles from Nashville. Under the provision in *Hill*, the wife agreed not to move from the state with the children.

relocation by the mother. The court should have applied Tenn. Code Ann. § 36-6-108 in resolving the petition to prevent relocation.

Although the trial court made a finding that the mother's proposed relocation was not reasonable, the court qualified that finding by stating it was not reasonable "under the Marital Dissolution Agreement." Other findings regarding the parties' reliance on the MDA and the success of the MDA's custody arrangement as to the child's welfare also indicate the court measured the relocation issue against the parties' agreement, not the statutory standards. The final order does not address the statutory procedure or standards and does not mention Tenn. Code Ann. § 36-6-108. Although not included in the final order, the trial judge stated from the bench that she would not apply the Relocation Statute.

The parties disagree somewhat on whether the trial court actually applied the standards set out in the Relocation Statute. The mother maintains that the court did not base its ruling on Tenn. Code Ann. § 36-6-108. The father asserts that since the court considered the reasonable purpose of the relocation, it implicitly applied Tenn. Code Ann. § 36-6-108(d)(1). However, the father also argues that the court found the relocation was not in the child's best interest, a finding relevant to Tenn. Code Ann. § 36-6-108(c). Mr. Helton acknowledges that it is unclear which section of the statute the court relied on: subsection (c) or subsection (d). The two subsections are mutually exclusive. The trial court did not state that it was applying either subsection (c) or subsection (d) of the statute and did not make factual findings that would be necessary to determine which subsection properly applied. We conclude that is because the trial court declined to apply the Relocation Statute in view of the MDA.

Because we have concluded that Tenn. Code Ann. §36-6-108 must be applied and the trial court declined to apply it, with the result that the court did not make the findings necessary under the statute, we must determine whether the record before us provides a basis for us to apply the statute and reach a decision on the merits. *See Kendrick v. Shoemake*, 90 S.W.3d 566, 571 (Tenn. 2002) (although the trial court did not apply the appropriate standard for a change of custody and did not set forth specific findings, the Supreme Court applied the standard to the evidence in the record and made its own findings); *Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn. 2000) (remanded for the trial court to determine the amount of child support that would have been due under the guidelines and to state any justification for a deviation from those guidelines); *Placencia v. Placencia*, 48 S.W.3d 732, 736 (Tenn. Ct. App. 2000) (vacating trial court's order and remanding for a hearing on the issues of relocation and custody where no hearing had been held on issues raised in pleadings after earlier appellate court decision); *Caudill*, 21 S.W.3d at 212 (applying the standards set out in the Relocation Statue to the evidence adduced at the hearing after reversing trial court's refusal to apply the statute on constitutional grounds).

IV. SECTIONS (C) AND (D) OF THE RELOCATION STATUTE

The first finding that must be made in order to apply the Relocation Statute is the relative amount of time each parent actually spends with the child. Depending on the answer to that question, either subsection (c) or subsection (d) of Tenn. Code Ann. § 36-6-108 governs the standard to be applied. Subsection (c) deals with situations where parents "are actually spending substantially equal amounts of time with the child," and states that in such cases, "[n]o presumption in favor of or against the request to relocate with the child shall arise." The court simply makes its determination based upon the best interests of the child.

Subsection (d) applies "[i]f the parents are not actually spending substantially equal intervals of time with the child, and the parent spending the greater amount of time with the child proposes to relocate with the child..." This subsection is more favorable to the relocating parent than is subsection (c) for it directs the trial court to allow the relocation unless,

> (1) The relocation does not have a reasonable purpose;
> (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or
> (3) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter the visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. § 36-6-108(d).

The burden of proving the existence of one of the enumerated circumstances lies with the party opposing the relocation. *Elder v. Elder*, No. M1998-00935-COA-R3-CV, 2001 WL 1077961 (Tenn. Ct. App. Sept. 14, 2001) (no Tenn. R. App. P. 11 application filed). If any of these circumstances is found to exist, Tenn. Code Ann. § 36-6-108(e) then directs the trial court to "determine whether or not to permit relocation of the child based on the best interest of the child." If the trial court finds that relocation is not in the best interests of the child and the parent spending the majority of the time with the child still elects to relocate, the court "shall make a custody determination and shall consider all relevant factors."

As stated above, the trial court did not make any factual findings regarding the time spent with the child.[3] The statute requires consideration of time "actually spent," indicating that the custody and visitation arrangement itself does not necessarily establish the time spent if there is evidence there was substantial deviation from that arrangement. In this case, the parents generally conformed to the visitation schedule established in the divorce decree. Consequently, Ms. Buscher argues that she is entitled to the benefits of Tenn. Code Ann. § 36-6-108(d) because even under the

[3] Although the trial court found that the father enjoyed more than the standard visitation, that finding does not equate to a determination of substantially equal time.

generous visitation provisions of the MDA, Luke spends 256 nights each year with her, and only 109 nights with her former husband, which equates to 30% of the nights with the father.

While Mr. Helton does not directly dispute Ms. Buscher's assertions regarding the number of nights spent with each parent, he nonetheless argues that subsection (c), rather than subsection (d), applies. To reach the conclusion that he actually spends substantially equal time with the child, he asks us to count as full days those times when he has the child for a portion of the day. For example, he argues that on those weekends when he picks the child up from school on Friday and returns the child to school on Monday morning, he has the child for all or part of four days. Applying that method of calculation to the visitation schedule, he asserts that he has the child for some part or all of 187 days each year. He accordingly contends that even though he may have to return Luke to Ms. Buscher on some of those days, the schedule amounts to a substantially equal sharing of the child by the parties. The fallacy with this argument is that if Mr. Helton is entitled to claim as full days those days on which he has visitation for part of the time, then Ms. Buscher would be similarly entitled to claim the portion during which she has custody as a full day also. Otherwise, Mr. Helton would receive credit for an entire day during which he only had the child for a few hours. The result is that the total for both parents would amount to more than 365 days per year. We decline to adopt such a method of calculation.

Absent other proof regarding the actual amount of time the child spends with each parent, we find Mr. Helton's arguments regarding the method of calculating the time unavailing. However, we believe the trial court is in a better position to determine the actual time spent with each parent under the visitation schedule and the parents' conformance to that schedule. Consequently, we have determined that this case should be remanded to the trial court for a finding on whether the parties actually spend substantially equal time with the child or whether Ms. Buscher actually spends substantially more time with the child.

If the court determines that subsection (d) of the statute is applicable, then the court should determine whether the relocation has a reasonable purpose, applying the statute and the cases decided under the statute. *See, e.g.*, Caudill, 21 S.W.3d at 212 (holding that the mother's desire to be with her new husband, who lived and had a successful business in Florida, was a reasonable purpose for the relocation). Although the trial court made a finding that the relocation did not have a reasonable purpose under the MDA, we decline to view that finding as one that there was no reasonable purpose under the statute and cases interpreting it. Consequently, we decline to apply the Tenn. R. App. P. 13(d) standard of review to that finding. The record includes proof that the parties argue support or contradict the reasonableness of the move, and we think the trial court should have the first opportunity to evaluate that proof under the applicable standards.

Mr. Helton has acknowledged that the risk of harm to the child is not an issue in this case. That leaves only the question of whether the mother's purpose for relocation is to defeat or deter the father's visitation rights. Ms. Buscher has offered various new visitation schedules that would provide Mr. Helton with the same number of days of visitation as he enjoyed under the previous

arrangement. Such an offer, combined with a finding of reasonable purpose for the relocation, has been sufficient to find there was no vindictive motive. *Caudill*, 21 S.W.3d at 213.

Much of the proof introduced in the hearing and much of the argument on appeal address the best interests of the child. As explained earlier, the best interests analysis does not become relevant if the custodial parent is actually spending the greater amount of time with the child and none of the circumstances set out in Tenn. Code Ann. § 26-6-108(d) is shown to exist. Having determined that the case should be remanded for the trial court to make the requisite findings on those issues, we decline to review the trial court's finding on best interests or the evidence relating to that finding.

V. OTHER PROVISIONS OF THE MDA

The disputed paragraph in the Marital Dissolution Agreement includes provisions for the wife to pay the attorney fees and other costs incurred by the husband as a result of her decision to relocate, as well as the expenses that he may have to incur in order to maintain the same level of visitation, in the event that she does actually relocate. We do not believe there is anything in Tenn. Code Ann. § 36-6-108 that would prevent the courts from enforcing these provisions. These provisions do not deal with the care, custody or control of the child and, consequently, remain enforceable as contractual provisions. *See Hogan v. Yarbro*, No. 02A01-9905-CH-00119, 1999 WL 1097983 (Tenn. Ct. App. Oct. 5, 1999) (no Tenn. R. App. P. 11 application filed) (holding that portion of MDA regarding attorneys fees incurred in enforcing the agreement retained its contractual nature.)

While Ms. Buscher does not raise the question of attorney fees on appeal, we think it would be helpful to state that even though Tenn. Code Ann. § 36-6-108 prevails over conflicting provisions of the MDA, that does not negate the portions of the MDA that deal with the allocation of the financial burdens incident to relocation, including the question of costs incurred for visitation.

VI.

The order of the trial court is reversed. Remand this cause to the Circuit Court of Davidson County for further proceedings to determine whether Ms. Buscher shall be permitted to relocate with the minor child. Tax the costs on appeal to the appellee, Shaun Edward Helton.

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PATRICIA J. COTTRELL, JUDGE